# Commonwealth of Massachusetts
# State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851


**CONFLICT OF INTEREST OPINION**
**EC-COI-03-3**

## QUESTION

May you apply for a position under the supervision of the board on which you serve without first resigning your board position?

## ANSWER

You are eligible to apply without having to resign. The board, however, may not take any action regarding your application, such as selecting you for an interview, until 30 days have elapsed after you have terminated your service as a member. The board, however, may act within the 30-day period on any other application.

## FACTS

You are the Town's representative to an authority ("Authority"), a state board. The Authority is a body corporate and a public instrumentality.[1] The Authority's mandate is to provide transportation, and, in that connection, to issue bonds.[2] The Authority's board ("Board") consists of five persons, one of whom must be a resident of the Town appointed by the selectmen. The members serve without compensation.[3]

The Board created an associate general counsel position among its staff. This is a full-time paid position. The Board periodically gives direction and oversight to its attorneys, including the associate general counsel. There may be a vacancy in the associate general counsel position. You are interested in applying and interviewing for that position without having to first resign your Board position.

## DISCUSSION

For purposes of the conflict of interest law, as a Board member you are a state employee.[4] Where you would be seeking an appointment to a position under the Board's direction and oversight, that would be a position under the supervision of your board. The answer to your question, then, turns on the meaning of the phrase "eligible for appointment or election" as used in G.L. c. 268A, § 8A. Section 8A of states:

> No member of a state commission or board shall be eligible for appointment or election by the members of such commission or board to any office or position under the supervision of such commission or board. No former member of such commission or board shall be so eligible until the expiration of thirty days from the termination of his service as a member of such commission or board. [5]

The Commission has explained in *EC-COI-92-30*[6] that sections like 8A, 15A, and 21A

> have their roots in the common law doctrine of incompatibility of offices. In *Gaw v. Ashley*, 195 Mass. 173 (1907), the Supreme Judicial Court first applied this doctrine to hold that a municipal board could not appoint its own member to a position under the board's supervision. While the court seemed chiefly concerned that the appointee would continue to sit on the board, and thus that his present colleagues would be supervising his performance, the court phrased the prohibition more generally, as prohibiting the appointment itself. Soon after the court again applied this prohibition, in *Attorney General v. Henry*, 262 Mass. 127, 132 (1928), the Legislature enacted a narrow exception, allowing the town meeting to approve an otherwise prohibited appointment [footnote omitted]. St. 1929, c. 36, enacting G.L. c. 41, § 4A.[7]

The Commission also observed in *EC-COI-92-30* that the Supreme Judicial Court later held[8] that G.L. c. 41, § 4A otherwise codified the common-law rule; and that shortly after § 21A of G.L. c. 268A was enacted in 1967, the court observed: "The legislative purpose behind the enactment of [§ 21A] seems to confirm the purpose which was contained in G.L. c. 41, § 4A."[9]

In *EC-COI-93-19* the Commission further observed as to the purpose of §§ 8A, 15A, and 21A:

> This incompatibility includes the potential danger that a board member will attempt to persuade his fellow colleagues to appoint him or otherwise engage in conduct which might give the appearance of such self-dealing activity, and the danger that, as a result of alliances formed through service together on a board, board members will be persuaded to reappoint one who, under different circumstances, they would conclude should be removed from office.[10]

The Commission has previously made clear that, under § 8A, a state board member may not be appointed by his board to a position the board supervises and then immediately resign his board position.[11] Similarly, in *EC-COI-92-30*, the Commission stated, "No vote to elect you [by the city council] is valid unless it occurs more than thirty days after your service as a Councillor ends."

The issue not decided in these prior opinions, and which we need to now decide, is to what extent a board member may indicate an interest in a position appointed and supervised by his board; and likewise, to what extent the board may indicate any interest in that application prior to the running of § 8A's 30-day termination of service period. [12]

The phrase "eligible for appointment or election" is not defined in G.L. c. 268A nor does it appear among the terms and phrases defined in G.L. c. 4. We therefore look to "the common and approved usage of the language."[13] We also look to the purpose of the legislation.[14] We apply common experience and common sense in interpreting such words as they appear in the conflict law.[15]

"Eligible" is commonly defined as "fitted or qualified to be chosen or used: entitled to something . . . worthy to be chosen or selected."[16] Appointment" means "designation of a person to hold a non-elective office."[17] "Election" means "the act or process of choosing a person for office, position or membership by voting."[18]

There is a certain degree of ambiguity in each of these terms. Taking them in reverse order, the word "election" as indicated by its dictionary meaning, explicitly leaves open the question as to whether it refers to the final act of selection or the entire process leading up to and including the final act. Similarly, the term "appointment" can be viewed as contemplating just the final act by a board in selecting someone to fill a position.[19] But it, too, can also arguably be viewed as including the entire process by which one is selected. Finally, the word "eligible" has the same ambiguity. One has to be qualified to be chosen, but when? At the beginning of the process or just at the time of the ultimate act that makes the choice final?

The ambiguity seems to markedly increase when all of the terms are put together into the phrase "eligible for appointment or election." The Legislature could have just said that a board could not appoint or elect one of its own members to a position it supervises until the cooling off period was observed.[20] Instead, however, the Legislature appears to have intended something more subtle and arguably more expansive by focusing on when such a person is *eligible* for appointment or election.

In any event, standard rules of statutory interpretation as noted above indicate that one looks at the language "in the context of the objectives which the law seeks to fulfill."[21] As noted above, the Commission has already indicated that one of the purposes of this statutory language is to prevent or at least minimize the appearance of colleague exploitation. It is important that applicants have a level playing field and that the best applicant be chosen.[22]

In order to achieve that purpose and give weight to what we view to be the legislative intent behind the repeated choice of the word "eligible" in this section, it follows that one has to be qualified to be chosen early in the selection process. Thus, any interaction by the board with one of its own members regarding his candidacy, such as an interview, exposes the board to at least the implicit pressure of favoring an "inside" colleague applicant over others. Indeed, even such decisions as to whom to interview carry that concern if the board knows a colleague is an applicant.

We believe, however, that our interpretation should not be so restrictive as to prevent a board from deciding when and where to post the vacancy and what deadline to set for applications without making its members ineligible as candidates for the position. The logistics of the posting would seem to have little to do with any act of selecting. Moreover, if the board knew one of its members was interested in the vacancy, the other board members could make him ineligible by taking any act to begin filling the position, such as posting the vacancy. Such an interpretation would appear to be inconsistent with the language and intent of the statute, which is to allow board members to be eligible for the selection process if the 30-day termination of service period is observed.

In addition, we believe that at least some weight should be given to the concern that too restrictive a position might result in losing the best candidate, if the best candidate were a present board member who wanted to apply. For example, if a board needed to fill a position quickly, and consequently wanted to establish a quick deadline for applications, a present member would not even be able to apply if that deadline were less than 30 days away.

Ultimately, in balancing the equities and the objectives of the statute, we conclude that a board member may apply for a position without observing the 30-day cooling off period. The board may not take any action regarding that application until the 30-day cooling off period has been observed. The board may, however, interview other candidates and take any action it deems appropriate regarding those candidates at any time.

Additionally, we note that there are other provisions of the conflict of interest law that also serve to protect the integrity of the public hiring process. Thus, § 23(b)(2)[23] prohibits the non-applicant board members from selecting an unqualified colleague. More generally, it prohibits the board members from giving their colleague applicant any kind of preferential treatment. For example, they should not give their colleague access to them not otherwise made available to all other applicants.

Finally, when and if board members are called upon to consider the application of a former member with whom they have served, they should make a written disclosure of that fact pursuant to § 23(b)(3).[24]

**DATE AUTHORIZED**: November 12, 2003

---

[1] Legislative Act.

[2] *Id.*

[3] *Id.*.

[4] "State employee, a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council." G.L. c. 268A, § 1(q). It should be noted that because Authority members are not paid, they are "special state employees" for G.L. c. 268A purposes. That distinction, however, does not factor into this opinion.

[5] The phrase is identical in § 15A (the county counterpart to § 8A) and § 21A (the municipal counterpart to § 8A). Therefore, our interpretation will apply equally to county and municipal employees.

[6] *EC-COI-92-30* involved a city councilor who wanted to be appointed by the city council as city clerk, a position supervised by the council.

[7] G.L. c. 41, § 4A states in part:

> Except as otherwise expressly provided, a district board, if authorized by vote of the district at an annual district meeting, or a town board may, if authorized by vote of the town at an annual town meeting, appoint any member thereof to another town or district office or position for the term provided by law, if any, otherwise for a term not exceeding one year.

For cities, the prohibition is codified in G.L. c. 39, § 8, which provides in relevant part: "No member of the city council shall, during the term for which he was chosen, either by appointment or by election of the city council …, be eligible to any office the salary of which is payable by the city."

[8] *Mastrangelo v. Board of Health of Watertown*, 340 Mass. 491, 492 (1960).

[9] *Starr v. Board of Health of Clinton,* 356 Mass. 426, 429 (1969).

[10] In that opinion the Commission interpreted § 21A – the municipal counterpart to § 8A – as preventing an administrative assistant to the board of selectman who had become a selectman from being eligible for *reappointment* as such assistant unless he observed the 30-day requirement. In other words, the selectman would have to get town meeting approval or resign as selectman and wait 30 days before the selectmen could reappoint him as their administrative assistant.

[11] In *EC-COI-80-44* the Commission construed § 8A as making a Board of Registration of Barbers member ineligible to be appointed to an investigator position subject to that board's supervision, even though the member was willing to resign and wait 30 days before assuming the duties of that position, where the board had already written a letter initiating the formal process to so appoint him. (The letter made clear that the board had been trying for over a year to so appoint him.) The Commission stated:

> Since you were a board member at the time the Board initiated the formal process to appoint you to this position, and, therefore, were not eligible at that time for appointment, you are precluded by this section from accepting the position. The fact that you would resign your state position and wait 30 days before accepting the appointment is not, under these circumstances, significant.

[12] Of course, if a board member knows he plans to apply, he must abstain from any involvement in such decisions as a board member. Section 19 of G.L. c. 268A would prohibit a board member from participating as such in any particular matter in which he had a financial interest.

[13] G.L. c. 4, § 6 (Third). *See McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 425 (1992).

[14] *Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 392 Mass. 811, 813 (1984) ("The intent of the legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. The intent is discerned from the ordinary meaning of the words in a statute considered in the context of the objectives which the law seeks to fulfill.")

[15] *EC-COI-98-02.*

[16] *Webster's Third New International Dictionary* (1993). *See also Black's law Dictionary* (Seventh Ed. 1999): "Fit and proper to be selected or to receive a benefit; legally qualified for an office, privilege, or status."

[17] *Webster's Third New International Dictionary (1993). See also Black's law Dictionary* (Seventh Ed. 1999): "the designation of a person, by the person or person having authority therefor, to discharge the duties of some office or trust."

[18] *Webster's Third New International Dictionary (1993).*

[19] *See Goutos v. U.S.*, 552 F.2d 922 (Ct. Cl. 1976) (an appointment is not made until the last act required by the person or body vested with the appointment powers is performed.)

[20] The Legislature, for example, could have said, "No member of a … board may be appointed or elected by the members of such board …" and, "No former member of such board may be so appointed or elected until the expiration of 30 days…"

[21] *Int'l Organization of Masters, supra.*

[22] As the Supreme Judicial Court has recognized,

> [T]he Legislature's concern about conflict between private interests and public duties may reasonably have motivated it to prohibit involvements that might present *potential* for such conflicts… . The Legislature was entitled to adopt the safer course of precluding all potential conflicts before they became a reality and before damage, even unwittingly, has been done. The Legislature may have recognized that it is not always easy to tell when an actual conflict has arisen. (emphasis in the original)

*Edgartown v. State Ethics Commission*, 391 Mass. 83, 89 (1984).

[23] Section 23(b)(2) prohibits a state employee from knowingly or with reason to know using or attempting to use his official position to secure an unwarranted privilege or exemption of substantial value not properly available to similarly situated individuals.

[24] Section 23(b)(3) prohibits a public employee from, knowingly or with reason to know, acting in a manner which would cause a reasonable person, knowing all of the facts, to conclude that anyone can improperly influence or unduly enjoy that person's favor in the performance of his official duties. This subsection's purpose is to deal with appearances of impropriety, and in particular, appearances that public officials have given people preferential treatment. This subsection goes on to provide that the appearance of impropriety can be avoided if the public employee discloses in writing to his appointing authority all of the relevant circumstances which would otherwise create the appearance of conflict. The appointing authority must maintain that written disclosure as a public record.